

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 30, 2006 Session

KATHRYN CHAMBERLAIN v. THE KROGER COMPANY

**Appeal from the Circuit Court for Davidson County
No. 03C-145 Marietta Shipley, Circuit Judge**

No. M2005-00435-COA-R3-CV - Filed on September 27, 2006

The Appellant, Kroger Limited Partnership I, appeals from a judgment of the trial court awarding the Appellee, Kathryn Chamberlain, \$473,500.00 for injuries she alleged to have sustained in a fall at the Belle Meade Kroger on August 24, 1999. The issues raised on this appeal are (1) whether the trial court erred by directing a verdict that the tinnitus suffered by Ms. Chamberlain was caused by her fall; (2) whether the trial court erred by excluding evidence of a failed marriage of Ms. Chamberlain and of a physician's note indicating her tinnitus resulted from a motor vehicle accident; and (3) whether the trial court erred in admitting evidence of amounts charged for prescription medications purchased by Ms. Chamberlain. We agree with the Appellant that it was error for the trial court to have granted a directed verdict with regard to the issue of causation of Ms. Chamberlain's tinnitus and reverse the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed.

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which ALAN E. HIGHERS and HOLLY M. KIRBY, JJ, joined.

Michael H. Johnson, Nashville, Tennessee, for the Appellant, Kroger Limited Partnership I.

G. Thomas Nebel, Suzette Peyton, Nashville, Tennessee, for the Appellee, Kathryn Chamberlain.

OPINION

On August 24, 1999, the Plaintiff, Kathryn Chamberlain, fell and struck her head on a concrete floor while shopping at the Belle Meade Kroger store in Nashville, Tennessee. She was taken by ambulance to the emergency room at Saint Thomas where, according to the emergency room records, she was complaining of neck pain, headache and left elbow pain. A CT scan taken of the head was negative for hemorrhaging around the brain and subdural hematoma. No abrasions, bruises or swelling was noted. A loss of curvature in the cervical spine was noted indicating a musculoskeletal sprain of the neck. An x-ray of her left elbow was normal. She was released from

the emergency room with a diagnosis of cervical sprain secondary to a fall and left elbow contusion injury.

On August 26, 1999, Ms. Chamberlain returned to the emergency room at Saint Thomas Hospital. According to the emergency room records, she had seen her primary care physician that same day. She complained of a high pitched sound in both ears or tinnitus and vertigo. She was evaluated and released with a diagnosis of post concussion syndrome and vertigo.

During September 1999, Ms. Chamberlain reported similar complaints to her primary care physician. On September 15, 1999, a CT scan of the temporal bone, looking for specific inner-ear trauma, was performed and showed no abnormalities. She was referred by her primary care physician to Dr. Mitchell Schwaber, a physician specializing in the treatment of the ear, nose and throat. Dr. Schwaber first saw Ms. Chamberlain on October 18, 1999. He ordered an MRI of the head with special attention to the internal auditory canals. This study was conducted on October 20, 1999, and no abnormalities were detected. Ms. Chamberlain appears to have been referred by Dr. Schwaber for a neurological examination. This examination was performed by Dr. Brian Thompson on September 19, 2000, and was within normal limits.

On August 1, 2000, Ms. Chamberlain sought treatment from Dr. David Haynes, also a physician specializing in the treatment of the ear, nose and throat, complaining of ringing in her ears and disequilibrium. She also reported a history of depression and panic attacks. Dr. Haynes also referred her for a neurological examination. This examination was conducted on September 27, 2000, by Dr. Michael Kaminsky, and the results of the examination were within normal limits.

Ms. Chamberlain lost her job in March 2000. About this time, she began seeking treatment for depression and stress at Luton Mental Health Services in Nashville, Tennessee. In June 2001, she sought treatment from a physician at the psychiatric department of the Vanderbilt University Medical Center, in Nashville, while continuing her counseling at Luton. One of the physicians she saw there was Dr. Glenn Webb. When she first saw Dr. Webb in July 2001, he was a third year resident at Vanderbilt. Following his graduation, Ms. Chamberlain continued treating with him at the Cheer Mental Health Center in McMinnville, Tennessee.

On January 15, 2003, Ms. Chamberlain filed suit in the Circuit Court for Davidson County, Tennessee, seeking to recover damages for the injuries she sustained as a result of the August 24, 1999, fall in Kroger. The case was tried before a jury on November 1 through 5, 2004. During the trial, Dr. David Haynes testified by way of deposition that, in his opinion, the tinnitus suffered by Ms. Chamberlain was a result of the trauma she sustained during the fall at Kroger. Dr. Glenn Webb testified that she suffered from post-traumatic stress disorder, depression and panic attacks as a result of the tinnitus. Dr. John J. Griffin, a psychiatrist who evaluated Ms. Chamberlain on behalf of the Defendant, Kroger, testified Ms. Chamberlain suffered from a depressive disorder caused by multiple stresses and difficulties experienced by Ms. Chamberlain throughout her life and a personality disorder that pre-dated the August 24, 1999, fall at Kroger. At the conclusion of the proof, the trial

court directed a verdict in favor of the Plaintiff with regard to the issue of whether the fall at Kroger caused the tinnitus that Ms. Chamberlain suffered.

The jury returned a verdict in favor of Ms. Chamberlain totaling \$473,500.00 that included \$315,000.00 for past and future medical expenses, \$60,000.00 for pain and suffering, \$50,000.00 for loss of earning capacity, and \$15,000.00 for the loss of enjoyment of life. On December 3, 2004, the Defendant, Kroger, filed a Motion for New Trial setting forth as grounds for new trial the same issues presented for our review. The Motion for New Trial was overruled by the trial court on January 7, 2005, and this appeal was taken.

The first issue presented for review by the Appellant, Kroger, is whether the trial court erred in directing a verdict in Ms. Chamberlain's favor that her fall in Kroger on August 24, 1999, caused her to develop tinnitus. The evidence concerning this issue was presented through the deposition testimony of Dr. David Haynes and the medical records exhibited to his testimony.

Dr. Haynes described tinnitus as a noise that the patient can hear. The common form of tinnitus is subjective meaning that the patient hears the noise but it cannot be heard or detected by the examiner. The condition can be debilitating if the noise heard by the patient is loud enough. Some patients report the noise as being so loud that they cannot hear sound that is actually being produced. Dr. Haynes equated tinnitus with pain in that the examiner does not know how bad it is except by what the patient describes.

According to Dr. Haynes, a substantial percentage of the American population suffers from tinnitus. He enumerated repeated exposure to loud noises, medications, and aging as potential causes for the condition. He further testified that depression can be a cause of the condition or can make coping with the condition worse. According to Dr. Haynes, tinnitus is rarely caused by trauma to the head. He reasoned, however, that Ms. Chamberlain is not in the age group that commonly begins to experience the condition. Tinnitus caused by exposure to noise normally occurs gradually whereas Ms. Chamberlain reported a sudden onset of ringing in her head that coincided with her fall at Kroger. As a result, it was the opinion of Dr. Haynes, based upon the history given him by Ms. Chamberlain, that the tinnitus suffered by her was the result of her fall at Kroger.

Generally, this court has held that the trier of fact may not ignore undisputed testimony of a medical expert with respect to scientific information. *Hudson v. Capps*, 651 S.W.2d 243, 247 (Tenn. Ct. App. 1983); *Reserve Life Ins. Co. v. Whittemore*, 59 Tenn. App. 495, 442 S.W.2d 266, 275 (Tenn. 1969); *Fuller v. Speight*, 571 S.W.2d 840, 841-42 (Tenn.Ct.App.1978). This general rule has been determined to be inapplicable, however, when a medical opinion is based upon purely subjective findings. *Baxter v. Vandenheovel*, 686 S.W.2d 908, 912 (Tenn. App. 1984). Thus, this court has held that when the medical proof or opinion is based on purely subjective findings, the jury may ignore undisputed medical proof to the extent it is based upon the physician's assessment of the credibility of the patient. Such credibility is ordinarily for the jury and, thus, the jury is not bound to accept the medical testimony as conclusive. *Id.*; *Bruce v. Shattuck*, 1993 Tenn. App. LEXIS 282, NO. 03A01-9208-CH-00287, 1993 WL 119796 at *3 (Tenn. Ct. App. April 16, 1993); *Barbee v.*

Dixon, 1992 Tenn. App. LEXIS 869, No. 01A01-9202-CV-00072, 1992 WL 296739 at *6 (Tenn. Ct. App. October 21, 1992)

This Court reviews the trial court's decision to grant a directed verdict de novo, applying the same standards as the trial court. *Gaston v. Tenn. Farmers Mut. Ins. Co.*, 120 S.W.3d 815, 819 (Tenn. 2003). We will affirm a directed verdict "only when the evidence in the case is susceptible to but one conclusion." *Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn. 2002). We must "take the strongest legitimate view of the evidence favoring the opponent of the motion," and must accept all reasonable inferences in favor of the nonmoving party. *Id.* We may affirm the motion only if, after assessing the evidence according to the foregoing standards, we determine that reasonable minds could not differ as to the conclusions to be drawn from the evidence. *Biscan v. Brown*, 160 S.W.3d 462, 470 (Tenn. 2005); *Childress*, 74 S.W.3d at 328.

Applying these principles to the present case, we must conclude that the trial court erred in directing a verdict with regard to whether the tinnitus suffered by Ms. Chamberlain was caused by her fall at Kroger. According to the testimony of Dr. Haynes, tinnitus is rarely caused by trauma. The sole reason for his opinion that Ms. Chamberlain's tinnitus was caused by the fall was that she related to him, more than a year after the occurrence, that the onset of the ringing in her ears coincided with her falling and striking her head. None of the CT scans, MRI's, or neurological examinations revealed any evidence of trauma or damage that would explain her reported condition. She testified that the ringing in her head began immediately after the fall, but the emergency room records failed to indicate she reported this symptom upon her initial treatment. The fact she returned to the emergency room two days later, after having seen her primary care physician, and reported the ringing in her head is an unusual circumstance that might cause a reasonable person to question her motive for doing so. Taking, as we must, the strongest legitimate view of the evidence in favor of Kroger, we are of the opinion that a reasonable mind could conclude the tinnitus reported by Ms. Chamberlain was not caused by the trauma of her fall. Moreover, any conclusion that Ms. Chamberlain suffers from this condition or that its onset coincided with her fall must be based upon her credibility which, as we have stated, is an issue to be determined by the trier of fact. Accordingly, we must reverse the judgment of the trial court and remand the case for a new trial.

The second issue presented for review is whether the trial court erred by excluding portions of the deposition testimony of Dr. John G. Griffin relating to Ms. Chamberlain's marriage to an Albanian man who she shortly discovered had married her in order to remain in the United States. The record indicates, however, that the exclusion of this portion of the deposition was not based upon a ruling of the trial court.

On July 30, 2004, a motion in limine was filed by the Plaintiff seeking to exclude evidence relating to her marriage to an Albanian gentleman who she later discovered had married her in an effort to remain in the United States. The ground for this motion was that this evidence had no relevance to issues to be determined by the jury. Kroger filed a response to this motion on August 9, 2004, and the trial court, Judge Barbara Haynes presiding, granted the motion by order dated August 25, 2004, prohibiting defense counsel from discussing at trial the reasons for Ms.

Chamberlain's divorce and specifically her belief that the man married her to obtain a green card.

Thereafter, on August 27, 2004, the deposition of Dr. John G. Griffin was taken by the Appellant. Dr. Griffin testified Ms. Chamberlain suffered from depressive disorder caused by multiple stresses and difficulties experienced by Ms. Chamberlain throughout her life including her recently failed marriage. During his testimony, the following dialog took place:

Q: (By Mr. Johnson) Did Ms. Chamberlain relate to you her social history as an adult?

A: (By Dr. Griffin) Yes.

Q: What was that?

A: The history she related to me includes the fact that she was married twice. The first marriage lasted six or seven years. The husband was an alcoholic and abusive, and she decided to divorce him because of that. She had two daughters from that marriage. I think they are 25 and 21 or 22, April and Jana. And the youngest daughter has a three-year-old son, her grandson.

After that marriage, Ms. Chamberlain had a serious relationship with a man for some time. That didn't work out. Then it seems like there were periods of time when – years when she didn't have any serious relationships.

In the late 1990s, she met a man and dated him for several months. They married, and after ten days, she divorced the man. *Among other things, he was from Albania, and there was a sense – not only that he really wasn't making a commitment to her and didn't love her but also that perhaps he married her more to get the kind of paperwork to stay in this country than anything else.*

On October 15, 2004, Appellant filed a motion *in limine* seeking to have the trial court allow the details of Ms. Chamberlain's failed marriage on the ground Dr. Griffin described it as a stressor in her life that led to her depressive disorder. When the Appellant argued its position to the trial court on November 1, 2004, the following dialog took place:

MR. JOHNSON: And, you know, the judge said I could go into the marriage that was short but not the green card aspect of it. And, you know, obviously this is a psychiatric injury. But the doctor mentioned it so I thought I would throw it in there right now. If I've got to get it out, I'll get it out.

.....

THE COURT: Well, it really does seem irrelevant. There's so many other things you can get her on.

MR. JOHNSON: Okay.

THE COURT: I mean, she's got a rich history.

MR. JOHNSON: Yes, she does, I'll take it out.

The italicized portion of Dr. Griffin's testimony was removed from the deposition. In our view, the Appellant failed to obtain a definitive ruling from the trial court as to the admissibility of the withdrawn testimony. Absent a definitive ruling, we are left to speculate as to what the trial court's ruling would have been had it ruled on the admissibility of this evidence, which we decline to do. Since the Appellant did not obtain a definitive ruling on its pretrial motion *in limine*, the issue should have been raised during the course of the trial. See Rule 103, Tenn. R. Evid. It was not. The Appellant seeks to ground denial of the exclusion of this evidence on the August 25, 2004, order of the trial court with regard to this subject matter. The trial judge did not, however, have Dr. Griffin's testimony before her at that time.

We agree with the Appellant that the excised portion of Dr. Griffin's testimony is relevant to his opinion that Ms. Chamberlain's depressive disorder was caused by life stressors experienced by her including several failed relationships. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Tenn. R. Evid. The omitted details of Ms. Chamberlain's failed marriage tend to indicate the amount of stress and discomfort experienced by her which, according to Dr. Griffin, resulted in her depressive disorder. Relevant evidence may, however, be excluded by the trial court if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, Tenn. R. Evid. Our Supreme Court has emphasized that Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence. Excluding relevant evidence under this rule is an extraordinary remedy that should be used sparingly and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion. *State v. Robinson*, 146 S.W.3d 469, 490-91 (Tenn. 2004). Since, however, that determination has not been made with regard to Dr. Griffin's testimony, the issue may be presented to the trial court on remand.

The Appellant next alleges the trial court erred in excluding the deposition testimony of Dr. H. Keipp Talbot relating to entries in Ms. Chamberlain's medical records referencing a motor vehicle accident. In her deposition, Dr. Talbot testified that at the Vanderbilt University Internal Medicine Clinic, medical records are maintained by computer. At the time she saw Ms. Chamberlain, physicians at the clinic took notes during their examinations and later dictated a note to be transcribed into the computer record. This computer record may be accessed by other physicians treating the patient.

Dr. Talbot first examined Ms. Chamberlain on August 16, 2001, when she came to the clinic seeking a new doctor. On that occasion, according to the medical record, Ms. Chamberlain gave a history of having a fall with chronic ear ringing ever since. Following that visit, in January 2002, Ms. Chamberlain was seen in the gynecology department by Dr. Sanford Kim. Dr. Kim's record, dated January 7, 2002, stated a medical history, "Status post MVA with head injury about two and

a half years ago.” Dr. Talbot next saw Ms. Chamberlain on June 13, 2002, and reported in her note, “Ms. Chamberlain has chronic tinnitus secondary to an MVA.” Dr. Talbot was unable to determine whether she obtained information concerning the noted motor vehicle accident from Ms. Chamberlain or from the note dictated by Dr. Kim. Dr. Talbot had no independent recollection of Ms. Chamberlain stating she was involved in a motor vehicle accident. Attached to Dr. Talbot’s deposition was the sworn affidavit of Ms. Chamberlain stating that she had not been involved in a motor vehicle accident in or around 1999. The trial judge found that the reference in Dr. Talbot’s medical record dated June 13, 2002, was not a statement made by Ms. Chamberlain for the purpose of diagnosis and treatment pursuant to Rule 803(4), Tennessee Rules of Evidence, and was, therefore, inadmissible hearsay. The trial court then stated its belief that after the exclusion of Dr. Talbot’s June 13, 2002, medical record, the remainder of Dr. Talbot’s testimony was irrelevant.

This court reviews a trial court's decision to admit or exclude evidence by an abuse of discretion standard. *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004) . A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. *Id.*; *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001).

Rule 801, Tennessee Rules of Evidence, defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 802 provides that hearsay is not admissible in evidence except as provided by the rules of evidence or otherwise by law. Rule 803 contains exceptions to the hearsay rule and provides that a statement offered against a party that is the party’s own statement , Tenn R. Evid, 803(1.2), or a statement made for the purposes of diagnosis and treatment describing the inception or general character of the cause of pain, symptoms or sensation, Tenn R. Evid. 803(4), are not excluded by the hearsay rule.

In our view, the trial court’s reliance on Rule 803(4) to exclude the statement relating to a motor vehicle accident was misplaced. Moreover, the record does not factually support such a holding since the note continues: “Ms. Chamberlain has chronic tinnitus secondary to an MVA. She presents today with worsening of her chronic tinnitus and severe depression.” It is obvious from these statements that Ms. Chamberlain sought treatment for her worsening tinnitus and the note describes the inception of that condition. If the quoted notation was based upon statements made by Ms. Chamberlain, they clearly were statements made for the purposes of diagnosis and treatment and described the inception or general character of the cause of Ms. Chamberlain’s pain and symptoms. The trial court’s finding the statements were not made for the purposes of diagnosis and treatment and therefore should be excluded was contrary to the weight of the evidence.

More importantly, however, the trial court applied an incorrect legal standard. If the notes the defendant sought to enter into evidence were based upon statements made by Ms. Chamberlain, they are statements offered against a party to the litigation that are the party’s own statements and are not excluded as hearsay pursuant to Rule 803(1.2), Tennessee Rules of Evidence. Accordingly, the real issue that should have been determined by the trial court was whether Dr. Talbot’s notes

relating to a motor vehicle accident were based upon statements made by Ms. Chamberlain. If so, they are admissible as a statement made by a party opponent without regard to whether they were made for the purposes of diagnosis and treatment. Since the trial court did not make a specific finding with regard to this issue, it is a matter that may be presented to the trial court on remand.

Finally, the Appellant alleges the trial court erred by improperly allowing the admission of Ms. Chamberlain's pharmacy bills. We are of the opinion this issue is pretermitted by our reversal of the trial court's judgment for improperly granting a directed verdict on the issue of causation of Ms. Chamberlain's tinnitus.

The judgment of the trial court is reversed and this matter is remanded with costs of appeal assessed against Kathryn Chamberlain.

DONALD P. HARRIS, SENIOR JUDGE